

Before the  
Federal Communications Commission  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of Section 309(j)	)	MM Docket No. 97-234
of the Communications Act	)	
-- Competitive Bidding for Commercial	)	
Broadcast and Instructional Television	)	
Fixed Service Licenses	)	
	)	
Reexamination of the Policy	)	GC Docket No. 92-52
Statement on Comparative	)	
Broadcast Hearings	)	
	)	
Proposals to Reform the Commission's	)	GEN Docket No. 90-264
Comparative Hearing Process to	)	
Expedite the Resolution of Cases	)	

**COMMENTS OF BREEZE BROADCASTING CO., LTD.**

Breeze Broadcasting Co., Ltd. ("Breeze"), by counsel, hereby submits its comments in response to the *Notice of Proposed Rulemaking*, FCC 97-397, released November 26, 1997 ("*NPRM*") in the captioned proceeding.<sup>1</sup>

**SUMMARY**

These Comments address the procedures the Commission should apply in pending comparative licensing cases (pre-July 1, 1997) for which a hearing has been held, the record has closed, and an Administrative Law Judge has issued an Initial Decision ("ID"). We demonstrate that, particularly where the ALJ has found that an applicant is financially unqualified, the hearing process has yielded a value which would be lost if the applicants were subsequently subjected to a Treasury auction. However, in the event the FCC nevertheless includes this class of applicants in the Treasury auctions process, we also show that the financially unqualified party should not

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<sup>1</sup> 62 Fed. Reg. 65392 (Dec. 12, 1997).

be eligible to participate. This rule will (1) further the FCC's statutory duty to act in the public interest and to implement the new auction rules in a rational way; and (2) comport with any due process considerations owed to applicants in pending proceedings.

## **I. THE RULES AS PROPOSED IN THE NPRM**

1. *Scope of Section 309(l); Pre-July 1, 1997 Applications.* In the *NPRM*, the Commission tentatively proposes to use auctions to resolve pending initial licensing proceedings that are within the scope of 47 U.S.C. § 309(l). However, at Paragraph 22 of the *NPRM*, the FCC countenances a "subset" of such applications which "progressed to either an Initial Decision by an ALJ or a decision by the former Review Board, before the court found in *Bechtel II* that the integration criterion used by the Commission was unlawful." The *NPRM* invites comment as to whether, considering "the resources these applicants have expended, as well as the delays they have encountered," auctions would be inappropriate.

In the event the Commission were to use auctions even in these cases, new Section 309(l) provides that "the Commission shall . . . (2) treat the persons filing such applications [i.e. competing applications for initial licenses or construction permits for commercial radio or television stations that were filed with the Commission before July 1, 1997] as *the only persons eligible to be qualified bidders.*" *NPRM* at ¶ 23 (emphasis added).

In the same section (¶¶ 23 - 35) the FCC considers "Rules and Procedures for Pending Comparative Licensing Cases," including "cases already designated for hearing." Where (i) a settlement is not filed, and (ii) the auction rules have become final, the Commission proposes that

[T]he ALJ (or the General Counsel on delegated authority in cases pending before the Commission) would issue an order directing that the permittee is to be determined by comparative bidding procedures from among the pending applicants *eligible to participate* in the auction, and indicating

*whether there are any unresolved questions as to a particular applicant's basic qualifications. If not, the hearing proceeding would be terminated. In the event questions remain with respect to an applicant, the hearing will be resumed in the event that applicant is the winning bidder after the auction. . . . We recognize that deferring questions as to the pending applicants' basic qualifications may require that we conduct a second auction if the high bidder is ultimately found disqualified, and that there are few remaining hearing cases. Thus, we seek comment on whether it would be more efficient to review the basic qualifications of the pending applicants prior to the auction."*

*NPRM* at ¶ 30 (emphasis added).

2. *Illustrative Case.* A case that illustrates the unique status of this "subset" of pre-July 1, 1997 applications is the Gulf Breeze, Florida FM proceeding, one of the "remaining hearing cases" referred to in the *NPRM*. *Ibid.* In this case, both the ALJ and the Review Board determined that J. McCarthy Miller was not financially qualified to construct and operate the Gulf Breeze station. The case is thus an excellent illustration of a virtue of the hearing process -- the exposure of a financially unqualified applicant. As we show in Section II, because the hearing has "done its work" by yielding decisional information about a party that has shown itself ineligible to be an FCC licensee, it would be senseless if the FCC were to ignore this history by sending these applicants to auction. Nonetheless, even if auctions were applied to this subset of applicants, we show in Section III that the FCC should adopt a rule that a financially unqualified applicant such as Miller is not eligible to participate.<sup>2</sup>

#### **I. THE BENEFITS OF HEARINGS ALREADY HELD SHOULD BE PRESERVED**

Where a comparative hearing has been held already -- and particularly where one of the parties has demonstrated itself to be a financially unqualified applicant -- it is clear that the

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<sup>2</sup> Breeze and Maranatha Broadcasting (the only other qualified applicant) have filed a settlement agreement that removes the conflict between these two applicants.

hearing process has performed a valuable function. For, regardless what comparative criteria (if any) the Commission were to apply to this subset of pre-July 1, 1997 applicants, in no event should a financially unqualified applicant be allowed to acquire an FCC license.

Considering the resources expended, both by the applicants and by the FCC; and considering that, as illustrated by the Gulf Breeze case, the “crucible” of the hearing process yielded critical information that logically bears on Miller’s eligibility to hold a license, it is unnecessary for the FCC to subject the applicants to an auction. Breeze has urged the retention of the comparative criteria in comments it submitted in GC Docket 92-52. It continues to believe that a judicially-sustainable formulation of the criteria can be created. But whatever approach the Commission were to fashion as applicable to the subset of cases under discussion here, the Gulf Breeze proceeding and others like it have proceeded too far to subject the applicants to an auction. By this, we mean not just that the equities favor retention of a comparative schema as to these applicants, but -- more fundamentally -- prudential considerations dictate this result. The FCC will most effectively promote the public interest by taking advantage of *the value* the hearing in this case has created. Indeed, to ignore that value would be capricious.

In the event the FCC concludes, however, that this subset of applicants should nonetheless be sent to auctions, we show in Section III that financially unqualified applicants should be deemed ineligible to participate.

### **III. FINANCIALLY UNQUALIFIED APPLICANTS SHOULD NOT BE PERMITTED TO PARTICIPATE IN AN AUCTION**

Adoption of a rule that precludes a financially unqualified applicant from auction participation is appropriate for two reasons: (A) such a rule will further the FCC’s statutory duty to advance the public interest and implement new Section 309(l) in a rational way; and (B) the

rule will comport with all requirements of due process.

**A. A Rule of Ineligibility Will Further the Public Interest  
And Will Be Rational**

1. *Public Interest Considerations.* The “paramount” interest in administrative proceedings is that of the public, and the “interests of private litigants must give way to the realization of public purposes.” *Virginia Petroleum Jobbers Ass’n v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958). It is axiomatic that the issue of an applicant’s financial ability to construct and operate a broadcast station is fundamental to the public interest. Obviously, the nexus between these two dimensions would be broken if a financially unqualified applicant were deemed eligible to participate in an auction. Thus, there cannot be any genuine dispute that the Rule of Ineligibility would serve the public interest by promoting the long-settled principles discussed above.

The public interest would be served in another way. The Congress as well as the FCC have repeatedly determined that a virtue of auctions is more rapid delivery of new service to the public, one of the FCC’s principal statutory objectives. *See, e.g., Marlin Broadcasting of Central Florida, Inc.*, 5 FCC RCD 5751 (1990) (objective of providing communications service to the public in the most efficient, expeditious manner possible carries substantial weight in balancing analysis); *Sutton v. City of Milwaukee*, 672 F.2d 644, 645-46 (7th Cir. 1982). If a financially unqualified applicant were allowed to participate in an auction, however, this objective would be undermined, as we discuss in detail *infra*.

Moreover, the FCC’s general competitive bidding rules provide that if the winning bidder is ultimately found to be unqualified to be a licensee, the Commission would conduct another auction for the license and this would require that it afford *new parties* an opportunity to file

applications for the license. See 47 C.F.R. § 1.2109(c); NPRM at ¶ 69. This would be egregiously prejudicial to the other parties in the case. To avoid the quagmire of that issue, the Commission should preclude unqualified applicants such as Miller from auction participation.

2. *Rationality*. There can be little question that a rule precluding a financially unqualified applicant from auction participation would satisfy the requirements of rationality. Clearly, defining the class of eligible auction participants by, *inter alia*, excluding a financially unqualified applicant, is reasonably related to the FCC's statutorily-imposed duty to act in the public interest. Again, the Gulf Breeze case illustrates this point clearly. An extensive and thorough hearing produced compelling evidence that Miller lacked the requisite financial ability to fund the various projects to which he was committed.

The Rule of Ineligibility would thus pass judicial review under such governing precedents as *NLRB v. Food and Commercial Workers*, 484 U.S. 112, 123 (1987) (agency given deference "as long as its interpretation is rational and consistent with statute"); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (agency regulations given deference "unless they are arbitrary, capricious, or manifestly contrary to the statute"); see also *E.E.O.C. v. Commercial Office Products Co.*, 486 U.S. 107 (1988).

Because the Rule of Ineligibility would promote the public interest and at the same time satisfy the requirements of rationality, it should be adopted unless there were a countervailing concern that a financially unqualified applicant's due process rights would be compromised if it were denied the privilege to participate in an auction. As shown below, no such concern arises.

#### **B. Due Process Considerations.**

Under the familiar test of *Mathews v. Eldridge*, the question of whether a rule denying a financially unqualified applicant the privilege of participating in an auction turns on (1) the

nature of the private interest at stake and the risk of an erroneous deprivation of that interest through the procedure used; and (2) the nature of the Government's interest. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

1. *The Nature of a financially unqualified applicant's interest in participating in an auction; the risk of deprivation of any such interest by adoption of the Rule of Ineligibility.* Here, of course, the threshold question is whether a financially unqualified applicant has *any* cognizable interest that requires special protection. It does not. As the FCC correctly observes in the *NPRM*, its authority to adopt a new rule does not depend on an applicant's expectations, but on whether the rule is arbitrary or capricious. *See NPRM* at ¶ 14, citing *DIRECTV v. FCC*, 110 F.3d 816, 825-26 (D.C. Cir. 1997). *See also*, our previous discussion in Section II(A)(2) *supra*. Thus, a financially unqualified applicant would not have a viable due process claim that a constitutionally-protected interest lay in its expectation of the ability to participate in the auction.

Moreover, considering the nature of the findings made by the ALJ in the Initial Decision and upheld by the Review Board in the Gulf Breeze case, it strains reason to think that such a defect would not *eo ipso* render Miller ineligible for participation in the auction. Of course, there is always the theoretical possibility that Miller could successfully appeal the adverse findings. But this does not in any way enlarge Miller's interest. It is well established that whatever the outcome of an auction, that outcome is subject to judicial review. Thus, Miller is protected. *See, e.g., Auction of IVDS Licenses*, 6 CR 134 (Wireless. Bur. 1997) (licenses awarded at re-auction would be, as a matter of law, subject to the outcome of court cases); *Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 735-36 (D.C. Cir. 1976) (grant of licenses are subject to judicial review and obligation of FCC to give effect to court's judgement).

2. *The Countervailing Interest of the Government.* Permitting a financially unqualified

applicant to participate in an auction would plainly violate the governmental interest in licensing broadcast facilities to parties who can be relied upon to be truthful with the agency that regulates them. Beyond this key factor, allowing the participation of a financially unqualified applicant virtually guarantees unnecessary delay in the advent of the new broadcast service to the public. A tainted applicant, if it were the high bidder at the auction, obviously could not proceed to become a licensee without *some manner* of additional inquiry. That procedure, even if it were defensible on other grounds (and we cannot imagine what such grounds would be) would cause delays that the Rule of Ineligibility would avoid.

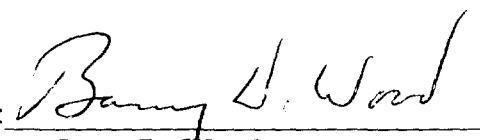
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#### IV. CONCLUSION

For the foregoing reasons, we urge the Commission to incorporate into its new rules the recommendations advanced herein.

Respectfully submitted,

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